

SOME ASPECTS OF DIMINISHED RESPONSIBILITY IN REPUBLIC OF BELARUS

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Summary

The article provides the review of the current approach to diminished responsibility in Republic of Belarus including the major definitions, legislative acts and forms of its practical realization. The authors also provide the recommended algorithms of proper methodology of expert conclusion formation basing on the analysis of contribution of legislative and medical criteria of diminished responsibility in certain situations and particularities of the diagnosis.

Introduction

New trends of the modern forensic psychiatry guaranty the maximum realization of the fundamental principles of expert practice - independence, directness of investigation and personal responsibility of the expert. However, new rules set specific requirements for the figure of an expert, whose professionalism is the main key to success of the ongoing reforms in forensic psychiatry [1]. This is related to allocation of the distinct profession "state medical expert in forensic psychiatry" in Republic of Belarus. The Main Department of Forensic Psychiatric Examinations (MD FPE) was established in the framework of the State Committee of Legal Expertise of the Republic of Belarus. This structure includes inpatient and outpatient departments of FPE in Minsk region centers and other major cities of Republic of Belarus.

Every year about 30 thousands of FPE take place in Republic of Belarus. More than 100 medical forensic psychiatric experts and psychologists-experts are employed under the auspices of the State Service of medical forensic expertise. Profession "State medical expert in forensic psychiatry" was introduced into the national classification of professions (position 21127 in the Uniform qualifying directory, vol. 35, approved by the Resolution of the Minis-

try of Labor and Social Protection №159 from 27.02.2004).

One of the topical problems in theory and practice of the modern forensic psychiatry is the problem of diminished responsibility. Diminished responsibility (or limited responsibility in Russian Federation Criminal Code) is a term used in the criminal law theory to describe the mental state of a person whose ability to realize the character and the social danger of his/her actions or to control them are limited due to presence of any mental disorder [1].

Aim of the study is to provide the review of the current approach to diminished responsibility in Republic of Belarus and to discuss certain principles of the expert conclusion formation during the criminal process.

Methods

For the review the current legislative acts were used as well as the relevant sources of national and international literature.

The concept of diminished or limited responsibility has been proposed in XIX century in order to permit the legal assessment of states located at the boundary between mental illness and mental health. It has been heavily criticized by many psychiatrists and lawyers. For example, Serbsky VP wrote: "The introduction of this concept into the law – given that it is impossible to provide any proper gauge to apply it in practice - would cause significant confusion and would give a false direction to resolving the issue of insanity, which allows only two solutions: a person had freedom of action - and then he/she is sane or did not have one - and then he/she is in sane"[2].

Nevertheless the modern jurisprudence admits that persons with borderline mental disorders (various forms of personality disorders, neurosis, residual effects of traumatic brain injury, alcoholism, drug addiction, toxic substance abuse, etc.) cannot be equated by criminal law to completely healthy persons [3-5]. Consequently the concept of diminished responsibility is reflected in different forms in the legislation of many countries: France, Germany, Switzerland, Poland, etc.

The norm regarding responsibility of persons with mental disorder which does not exclude their sanity was introduced into the Criminal Code of Russian Federation [6] in 1996 (article 22) and has immediately caused a large number of disputes.

Article 29 of the Criminal Code of Republic of Belarus 275-3 from 09.07.1999 states:

1. A person who have been in a state of diminished responsibility during the commitment of a socially dangerous act, e.g. could not be fully aware of the significance of his/her actions or control them due to a mental disorder (disease) or mental retardation, is not exempt from criminal liability.

2. The state of diminished responsibility can be taken into account when sentencing a subject or applying other measures of criminal liability to him/her and can serve as a basis for application of coercive measures of security and treatment.

Article 106 of the Criminal Code of Republic of Belarus regarding application of coercive measures of security and treatment for persons with diminished responsibility states: 1. If necessary, the court may apply coercive measures of security and treatment towards persons who have committed a crime in a state of diminished responsibility, became ill with a mental disorder (disease) after the sentence establishment or while serving their sentence, but who have not completely lost the ability to realize the significance of their actions or control them. 2. Coercive measures of security and treatment are applied towards persons mentioned in paragraph 1 of this Article at the place of punishment if person is convicted to arrest, imprisonment, or life imprisonment, or at the place of one's residence in form of involuntary outpatient observations and treatment by psychiatrist if person is sentenced to other types of penalties or other measures of criminal liability [7].

More information is available at: http://kodeksy-by.com/ugolovnyj_kodeks_rb/29.htm

The current Criminal Code has significantly changed and expanded the issues regarding medical and legal competence. In our view, this reflects a general trend of the healthcare low development in Belarus. Example of the new law clearly demonstrates a process of convergence of national legislation with international law, bringing it closer to a uniform, internationally derived approach for many issues regulation. This approach has led to inclusion of number of new medical and legal states in the Criminal Code.

First of all, it should be noted that the Criminal Code clarified the concept of insanity (art. 28). Insanity is a state when person could not be aware of the actual nature and social danger of his/her actions (inaction) or control them due

to a chronic mental illness, temporary mental disorders. It is assumed that the court may apply coercive measures of security and treatment towards a person found to be insane.

For the first time the concepts of diminished responsibility (art. 29) and state of affect (art. 31) were introduced into the Criminal Code and the state of intoxication was first clarified (art.30).

Diminished responsibility is considered as a state in which a person could not be fully aware of significance of one's own actions or control them due to a mental disorder or mental retardation. In that case the person is not exempt from criminal liability, but the state of diminished responsibility may be taken into account when sentencing a subject or applying other measures of criminal liability to him/her, and serves as a basis for coercive measures of security and treatment.

Chapter 14 of the Criminal Code of Republic of Belarus focuses on coercive measures of security and treatment that were named "coercive measures of a medical nature" in the Criminal Code in 1960. The issues of coercive treatment application towards mentally ill subjects were widely discussed in the literature due to imperfection of the existing criminal law, the absence of clear criteria for the referral to hospital for compulsory treatment and because of the need to introduce the conditional compulsory measure of medical nature [8].

In the new Criminal Code of Republic of Belarus these problems are solved. Article 100 clearly defines the goals of coercive measures of security and treatment. The aim of these measures towards mentally ill subjects who have committed socially dangerous acts is to prevent new delicts, to protect and to treat such persons. Regarding subjects with diminished responsibility the aim is to create the proper conditions for their treatment and to achieve the primary goals of criminal liability; regarding subjects suffering from alcohol addiction or substance abuse the aim is to provide the proper treatment and to create conditions to achieve the primary goals of criminal liability.

Four types of coercive measures of security and treatment are applied towards mentally ill subjects:

- 1) compulsory outpatient supervision and treatment by psychiatrist;
- 2) compulsory treatment in psychiatric hospital (department) with the common surveillance;
- 3) compulsory treatment in psychiatric hospital (department) with enhanced surveillance;
- 4) compulsory treatment in psychiatric hospital (department) with strict surveillance [7].

It is assumed that changing or cancellation of coercive measures of security and treatment towards mentally

ill persons is made by the court based on conclusion of psychiatrists. This category of patients must undergo an examination by a commission of psychiatrists at least once every six months.

The treatment of subjects suffering from alcohol addiction, drug addiction or toxic substance abuse is arranged at the place of the punishment if a person is sentenced to detention, imprisonment, or at the place of one's residence by the forced outpatient supervision and treatment if person is sentenced to other types of penalties or other measures of criminal liability (art. 107).

The legal criterion of diminished responsibility implies that a person has the ability to:

- be partially aware of the significance of his/her actions (intellectual feature);
- be partially able to control his/her actions (volitional feature).

Medical criterion of diminished responsibility implies that a person has the mental disorder or mental retardation [7].

Diminished responsibility represents a type of sanity (but not insanity). In this condition a person is not deprived of the ability to be aware of one's own actions and to guide them. Since the subject acts knowingly, he/she is also able to respond to justice for his actions and can be corrected by punishment. That is why a person who committed a crime in the state of diminished responsibility is not exempt from criminal liability and punishment. However, because subject's mind and will do not manifest in full degree, the state of diminished responsibility can be taken into account when sentencing him or applying other measures of criminal liability. If necessary the court may also apply coercive measures of security and treatment towards subject. Committing a crime while intoxicated does not exempt a person from criminal liability [9-12].

Let's consider the methodology of expert conclusions formation and peculiarities of making a forensic psychiatric diagnosis during criminal proceedings [13].

Medical criterion of diminished responsibility in article 29 of the Criminal Code of Republic of Belarus is given in the most general terms – "morbid mental disorder or mental retardation" [7, p.41] which allows very broad interpretation of it. But a broad and undifferentiated application of this criterion in practice would inevitably lead to discrediting of the concept of "diminished responsibility" and difficulties in application of article 29 of the Criminal Code. Therefore a very clear definition is required for clinical disorders that make it possible to use such legislation norm, to form the methodological framework of principles and criteria to justify conclusions about diminished responsibility.

A wide range of mental disorders that affect the legal status of the subject require comprehensive and differentiated approach to mental deviations in a variety of expert situations, comparing and contrasting them with the requirements of the legal criterion in each case [13-15].

Given the complex psychopathological nature of the medical criterion of diminished responsibility it should be noted that different mental functions are not always equally affected in the same mental disorder, the severity of their disturbances has individual character. Moreover, not all mental dysfunctions have equally significant impact on subject's behavior in certain situation. For example, delusional motivation or cognitive impairments can have predominant influence impeding the reflection process and behavior self-correction, markedly limiting the understanding of the actual nature and the social danger of one's own actions, as well as emotional disturbances can reduce subject's informed volitional control and interfere with the ability to guide his own actions.

The second step in making expert decision is to compare the data obtained regarding subject's mental state properties with the intellectual and volitional components of the legal criterion in a situation of delict. This is the most complicated and specific analytic part of the diagnostics in forensic psychiatry. It is not possible to predict all the variants of such comparison, however, expert conclusion should always be logical, clear, argumentative and scientifically grounded. Intellectual and volitional components constitute a single chain in justification of the legal criterion of diminished responsibility. Different mental disorders can include various combinations of such individual components. A certain interaction between intellectual and volitional components and their mutual influence should be taken into consideration as well.

The following examples illustrate some algorithms for comparing the medical criterion and intellectual and volitional components of the legal criterion of insanity or diminished responsibility:

a) There are cases in the expert practice when the emotional and volitional disturbances are mild, but cognitive impairment is severe. This combination of mental dysfunctions is one of the common cases in patients suffering from mental retardation. It would seem that such persons pose no danger, are not prone to conflicts or any antisocial actions and have quite good adjustment to life situations. Nevertheless such persons sometimes commit crimes in emergency situations, due to their inability to make fast, adequate and socially acceptable decisions and developing a state of perplexity, which results in aggression. In such cases, we can talk about the impact of the intellectual

component of the legal criterion on the volitional one, and to formulate the appropriate expert conclusion for the body that appointed the expertise.

The final motivational part of the expert conclusion should include an explanation in justification of the legal criterion. The approximate scheme of such justification may be as follows: despite the fact that significant emotional-volitional disturbances were not originally inherent in the subject, he/she was not able to make a quick, adequate, socially acceptable and controlled decision in this particular subjectively difficult situation due to prominent intellectual deficiency. The subject could not control his own behavior due to the fact that there was no opportunity to adequately assess the situation and consciously predict the consequences of his own actions. That indicates the presence of not only intellectual, but also volitional component of the legal criteria during the period related to the criminal act.

b) The ability of subject to realize the wrongfulness of his actions and the damage caused to society, as well as violation of rights and interests of others (expert criterion of “consciousness of social danger of one’s own actions”) does not always indicate the awareness of the actual nature of one’s own actions as the way and means to achieve one’s goals taking into account the social conventions. In specific case the justification of the legal criterion could be as follows: cognitive impairments did not interfere with subject’s ability to formally realize the wrongfulness of his actions in the situation of violent act. Nevertheless, due to specific torpidity of thinking he/she could not comprehend current situation as a whole and could not make an adequate decision. Violations of causality in subject’s thinking did not allow him to assess the circumstances, to predict the development of events and the consequences of his own actions during the time period related to the criminal act ... (followed by a conclusion about the impossibility to be aware of the actual nature of one’s own actions).

c) Possible situations in practice of forensic psychiatric expert can include cases when reduced criticism is not so much determined by impaired thinking or intellectual deficiency, but rather by the influence of emotional-volitional disturbances on the critical functions which reduce the conscious control over the situation. Such case is possible when subject suffers from mental disorders in epilepsy, when the intellectual criterion can be less significant, but specific personality disturbances are markedly prominent and can manifest in affective charge, rigidity of behavior, tendency to accumulate negative emotions, lack of understanding of emotions or behavior motives of others, establishment of judgments which are difficult to correct, affective explosivity and brutality. In a state of se-

vere dysphoria of non-paroxysmal nature such persons can commit aggressive acts, characterized by particular brutality. When motivating the expert conclusion it should be explained that specific personal traits indirectly contributed to reduced awareness of one’s own actions and adequate prediction of their consequences by directly affecting the volitional component of the legal criterion.

d) In single, quite rare situations the awareness of illegality of one’s own actions and their actual nature does not lead to adequate regulation of behavior and refusal to commit the crime. Such situations are possible in personality disorders, habit and impulse disorders. Isolated use of the emotional-volitional component of the legal criterion by psychiatry experts should be weighed carefully and thoroughly considered. Grounded justification for such conclusion must contain the information about dynamics of mental disorder and convincing arguments about the reasons for not allowing subject to fully control his actions.

When choosing the type of recommended coercive measures of security and treatment, forensic psychiatry commission takes into account not only the character of the crime [9-12]. Justification of any expert conclusion regarding coercive measures of security and treatment is based on the current mental state of the subject and a probabilistic forecast that determines the degree of his social danger [14].

The formulation and justification of the expert conclusion in the legal sense is the final and integrative stage of forensic diagnostics. Naturally the final decision concerning these issues, their approval and enforcing is the exclusive prerogative of the court. Expert conclusion is one of the evidence used in the investigation during the criminal process. The impact of mental disorders on human behavior in the criminal situation often has the format of the logically reasoned hypothesis, except when these disorders show distinct psychotic nature and are reflected in criminal behavior.

Absolutization of nosological principle in forensic psychiatry is now receding into the past given the current development of psychiatric taxonomy. Nosological paradigm familiar to the national forensic psychiatry comes into conflict with the well-known use of the International Classification of Disorders of 10th Revision in the Republic of Belarus (Section V «Mental and behavioral disorders») [16]. However although the adopted classification disciplines the diagnostic thinking of the expert and provides certain standards of diagnostic constructs, a formal use of it can lead to reduced diagnostic value and evidence-based nature of conclusion justification in certain cases because of the static character of approach standards. Therefore the specificity of making forensic psychiatric diagnosis is represented by multi-axial perspective evaluation of it.

This approach is fully consistent with traditional concepts of the national forensic psychiatric school [17] regarding “functionality” of diagnosis in accordance with the task assigned to forensic psychiatrist [11]. Any expert diagnosis in forensic psychiatry is a priori functional, because the qualified expert conclusion necessarily takes into account: the presence and the severity of psychopathology - Axis 1; the background underlying the development of the symptoms (personality disorders and mental retardation) - Axis 2;

the presence of somatic disorders that make a causal relationship with the mental state (“actual psychophysical status”) - Axis 3;

the impact of stressful circumstances and the negative effects of the environment - Axis 4;

the level of subject’s social functioning and prognosis - Axis 5 [16, 18].

Expert conclusion is included in 5th axis, as it reflects the current and predictable level of subject’s social functioning, including the risk assessment for possible illegal behavior.

Conclusions

1. The current approach to diminished responsibility in Belarusian forensic psychiatry and legislation is shifting towards international law and nosological classification.

2. Diminished responsibility does not exempt a person from criminal liability but can be taken into account during sentencing and serves as a basis for applying coercive measures of security and treatment.

2. Advanced methodology of expert conclusion formation should take into account the ratio of legal criterion (with intellectual and volitional components) and medical criterion of diminished responsibility, diagnosis peculiarities, dynamics of the disorder, as well as the multi-axial approach.

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KAI KURIE RIBOTO PAKALTINAMUMO ASPEKTAI BALTARUSIJOS RESPUBLIKOJE

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Raktažodžiai: ribotas pakaltinamumas, įstatymų leidyba, Baltarusija, ekspertinė išvada, kriterijus.

Santrauka

Straipsnyje pateikta šiuolaikinės prieigos prie riboto pakaltinamumo fenomeno apžvalga Baltarusijoje, su pagrindiniais apibūdinimais, teisės aktais ir jų praktinio realizavimo formomis. Autoriai taip pat siūlo algoritmus adekvačiai ekspertinės išvados formulavimo metodologijai, vadovaujantis įstatymų leidybos ir medicininių riboto pakaltinamumo kriterijų indėlio analize konkrečiose situacijose ir diagnozės ypatumuose.

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